

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN BENJAMIN,

Defendant-Appellant.

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UNPUBLISHED

November 26, 2002

No. 234897

Wayne Circuit Court

LC No. 00-010357

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with a dangerous weapon, MCL 750.82. He was sentenced as a fourth-habitual offender, MCL 769.12, to concurrent sentences of seven to fifteen years' imprisonment.<sup>1</sup> Defendant appeals by right. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

The guidelines established a minimum sentencing range of fourteen to fifty-eight months' imprisonment for defendant's assault convictions. Defendant's sentence reflected an upward departure of thirty-seven months. The court premised its guidelines departure on the fact that defendant was unable to conform his behavior to the standards of society as evidenced by his lengthy criminal history, which included approximately twenty-six major misconduct violations while incarcerated on previous convictions. The trial court also noted that defendant committed the instant offenses after he had absconded from parole. It also found that defendant's criminal history was all the more exceptional given his age of thirty-five and that he had failed to take advantage of previous chances to reform his behavior.

Defendant maintains that the trial court failed to present substantial and compelling reasons on the record to depart from the sentencing guidelines. Because the offense was committed in August 2000, the statutory guidelines apply. MCL 769.34(2). The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight. MCL 769.34(3)(a), (b); *People v Armstrong*, 247 Mich

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<sup>1</sup> Defendant was also convicted of second-degree retail fraud, MCL 750.356d, and sentenced to time served, but is not appealing this conviction or sentence.

App 423, 425; 636 NW2d 785 (2001). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). In addition, the substantial and compelling factors relied upon by the trial court must justify the particular departure at issue. *People v Hegwood*, 465 Mich 432, 437 n 10; 636 NW2d 127 (2001).

We believe that the trial court did not abuse its discretion in the instant case. Although defendant's previous convictions and his probation status at the time of the instant offenses were factored into the sentencing guidelines under the prior record variables, a number of the particulars of defendant's case were not taken into account in the scoring. Specifically, the guidelines do not take into account the fact that defendant has absconded from parole three times since beginning his adult criminal career.<sup>2</sup> Nor do they reflect the fact that defendant had twenty-eight major misconducts while in prison. These additional circumstances are objective, verifiable factors not considered by the guidelines evidencing defendant's inability to conform his behavior to the law and his contempt for the judicial system generally. We find that the trial court did not abuse its discretion in finding that "substantial and compelling reasons" existed warranting departure from the sentencing guidelines. *Babcock, supra* at 75-76.

Affirmed.

/s/ Jane E. Markey  
/s/ Henry William Saad  
/s/ Michael R. Smolenski

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<sup>2</sup> Defendant absconded for the third time shortly before committing the instant offenses.